

## CHAPTER 21

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# THE EFFECTIVENESS OF INTERNATIONAL ADJUDICATORS

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## 1 INTRODUCTION

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THE conditions under which international courts (ICs) and tribunals can be considered effective is an issue of increasing interest to judges, government officials, attorneys, and scholars. The fresh attention devoted to IC effectiveness is the inevitable consequence

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of a more active international judiciary.<sup>1</sup> As litigants ask courts to adjudicate an expanding and diverse array of controversies, judges must inevitably clarify the meaning of ambiguous treaty provisions and customary rules, and apply them to new and unforeseen contexts. Yet the rising number of IC rulings bears no necessary relationship to whether those rulings influence state behavior. Nor does it answer the more fundamental question of “effective for what purpose?”—an inquiry that depends on a prior conception of the functions that ICs perform and the goals they are expected to achieve.<sup>2</sup>

Traditionally, the principal function of ICs was to provide a judicial forum to assist nation states in settling their disputes. As the number and variety of ICs has increased, however, international judges have been given or have assumed a broad range of other tasks. These include exercising constitutional, enforcement, and administrative review;<sup>3</sup> stabilizing normative expectations and legitimating the exercise of public authority;<sup>4</sup> improving state compliance with primary legal norms;<sup>5</sup> engaging in judicial lawmaking to clarify or expand substantive obligations;<sup>6</sup> and enhancing the legitimacy of international norms and institutions, including of ICs themselves.<sup>7</sup>

Recent scholarship on IC effectiveness analyzes these functions from a range of vantage points. Some studies focus on developing typologies to categorize the multiple roles that ICs perform. Others assess empirically whether a particular IC, or the international judicial system in general, is successful in achieving one or more identified objectives. Yet another group of studies makes normative claims about which goals international judges ought to prioritize, regardless of the tasks that they in fact perform.

The literature exploring these issues includes works by legal scholars, political scientists, and interdisciplinary research teams. It would be impossible in this short chapter to do justice to this burgeoning literature.<sup>8</sup> The chapter focuses instead on

<sup>1</sup> For recent statistics, see K Alter, *The New Terrain of International Law* (Princeton University Press 2014), ch. 3.

<sup>2</sup> Y Shany, “Assessing the Effectiveness of International Courts: A Goal-Based Approach” (2012) 106 *AJIL* 225; D Shelton, “Form, Function, and the Powers of International Courts” (2009) 9 *Chi. J. Int’l L.* 537.

<sup>3</sup> Alter, note 1, at chs 5–8.

<sup>4</sup> A von Bogdandy and I Vetzke, “Beyond Dispute: International Judicial Institutions as Lawmakers” (2011) 12 *German L.J.* 979, 989–96.

<sup>5</sup> A Guzman, “International Tribunals: A Rational Choice Analysis” (2008) 157 *U. Pa. L. Rev.* 171, 188; Shany, note 2, at 244–5.

<sup>6</sup> K Alter and LR Helfer, “Nature or Nurture? Judicial Law-Making in the European Court of Justice and the Andean Tribunal of Justice” (2010) 64 *Int’l Org.* 563, 566; von Bogdandy and Vetzke, note 4, at 986–9.

<sup>7</sup> N Grossman, “Legitimacy and International Adjudicative Bodies” (2009) 41 *Geo. Wash. Int’l L. Rev.* 107, 110; Shany, note 2, at 246–7.

<sup>8</sup> For references to other scholarship on IC effectiveness, see Shany, note 2; G Shaffer and T Ginsburg, “The Empirical Turn in International Legal Scholarship” (2012) 106(1) *AJIL* 16–19.

four dimensions of IC effectiveness that, in this author's view, are important either because they have engendered debates among scholars, or, conversely, because they relate to core IC functions but have received insufficient scrutiny.

The first dimension, *case-specific effectiveness* (Section 2), evaluates whether the litigants to a specific dispute follow the orders and provide the remedies that a court awards—an issue closely linked to compliance with IC judgments.<sup>9</sup> The second variant, *erga omnes effectiveness* (Section 3), assesses whether IC rulings have systemic precedential effects that influence the behavior of all states subject to a tribunal's jurisdiction. The third dimension, *embeddedness effectiveness* (Section 4), evaluates the extent to which ICs anchor their judgments in domestic legal orders, enabling national actors to remedy potential treaty violations at home and avoid the need for international litigation. The fourth type, *effectiveness in developing international law* or *norm-development effectiveness* (Section 5), considers how IC decisions contribute to building a body of international jurisprudence—a topic relevant to the decentralized nature of the international legal system and debates over the fragmentation of international law. A brief conclusion (Section 6) follows.

For each dimension of IC effectiveness, the chapter reviews recent studies, identifies contested or under-analyzed issues and suggests avenues for future research. It does not, however, defend the substantive merits of the four effectiveness measures, nor does it evaluate their consequences for other values or objectives. For example, an IC that is adroit at developing international legal norms or embedding its judgments in domestic law may, as a result, narrow the discretion of government policymakers or diminish state sovereignty. Whether these or other consequences of IC effectiveness are normatively desirable or problematic is beyond the scope of this chapter.

## 2 CASE-SPECIFIC EFFECTIVENESS

Among the four dimensions of effectiveness, scholars have focused most heavily on whether the parties to a particular dispute obey an IC's judgment. This section reviews the theoretical literature on case-specific effectiveness and analyzes debates among scholars over its relationship to the distinct concept of state compliance with IC rulings. The section concludes by suggesting how future studies might help to resolve these debates and gain greater traction on the causal impact of IC rulings.

Early studies of case-specific effectiveness focused on whether a state found in breach of international law changed its behavior following an IC judgment. Laurence

<sup>9</sup> See, in this handbook, Huneeus, Ch. 20.

Helfer and Anne-Marie Slaughter, for example, defined effectiveness in terms of an IC's "ability to compel compliance with its judgments by convincing domestic government institutions, directly and through pressure from private litigants, to use their power on its behalf."<sup>10</sup> This definition recognized that most ICs cannot count on international enforcement mechanisms and must instead build support from domestic actors who in turn induce governments to respect IC rulings. The definition also expressly equated the concepts of case-specific effectiveness and compliance.

Subsequent theoretical contributions, however, emphasized the distinction between compliance and effectiveness. In an influential article, Kal Raustiala defined compliance as conformity between behavior and a specified legal rule, and effectiveness as "observable, desired changes in behavior" attributable to that rule.<sup>11</sup> In applying these definitions, Raustiala disaggregated the two concepts. High levels of compliance can occur "for reasons entirely exogenous to the legal process," such as where states draft treaties to mirror their preexisting behavior.<sup>12</sup> Conversely, international rules "can be effective even if compliance with them is low. If a legal standard is quite demanding, even widespread failure to meet it may still correlate with observable, desired changes in behavior."<sup>13</sup>

The basic insight is that international rules with high compliance rates may be entirely ineffective, whereas those with low compliance rates may be quite effective if they engender some modification of state behavior. The dangers of conflating the two concepts have led some scholars boldly to assert that compliance is "unusually ill-suited to [a] central social-scientific pursuit: the identification and measurement of causal effects," and to argue in favor of "dropping compliance as a central concept in the study of institutional effects."<sup>14</sup>

Scholars of ICs also stress the need to disentangle compliance and effectiveness. Karen Alter argues that "the real effectiveness test... is not compliance but the counterfactual of what the outcome would have been absent the IC. Those concerned with effectiveness should ask whether the IC contributed to moving a state in a more law-complying direction."<sup>15</sup> Shany makes a similar claim regarding judicial remedies: "[A] low-aiming court, issuing minimalist remedies, may generate a high level of compliance but have little impact on the state of the world."<sup>16</sup> Andrew Guzman

<sup>10</sup> LR Helfer and A-M Slaughter, "Toward a Theory of Effective Supranational Adjudication" (1997) 107 Yale L.J. 273, 290.

<sup>11</sup> K Raustiala, "Compliance and Effectiveness in International Regulatory Cooperation" (2000) 32 Case W. Res. J. Int'l L. 387, 391, 394.

<sup>12</sup> Raustiala, note 11, at 393.

<sup>13</sup> Raustiala, note 11, at 394.

<sup>14</sup> L Martin, "Against Compliance" in J Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 591–2. For further analysis, see E Hafner-Burton, D Victor and Y Lupu, "Political Science Research on International Law: The State of the Field" (2012) 106 AJIL 47, 89.

<sup>15</sup> K Alter, "Agents or Trustees? International Courts in their Political Context" (2008) 14 Eur. J. Int'l Rel. 33, 52.

<sup>16</sup> Shany, note 2, at 227 (emphasis omitted).

emphasizes the converse point, stating that “even when a state fails to comply with a tribunal’s ruling, the tribunal may be effective at promoting compliance if it imposes sufficient costs on the state to discourage future violations of the underlying legal rule.”<sup>17</sup>

These studies suggest that the conflation of compliance and effectiveness is as problematic when applied to the study of ICs as it is for the analysis of international law in general. Yet other scholars have argued, to the contrary, that compliance is an appropriate—and even a superior—measure of IC effectiveness in at least one important instance: when a court rules that a state has violated international law. As Darren Hawkins and Wade Jacoby explain:

When a country persists in behaviour long enough for an international court to rule against that country’s practices, and the country subsequently changes its practices, we assume that the court’s ruling helped trigger the change in behaviour, even if other factors may also have been important. . . . Compliance in these circumstances is very unlikely to be the result of chance: most international litigation takes years and costs states significant money to defend; it is therefore reasonable to assume that the state prefers to persist in the behaviour being challenged in court. *Hence, any resulting behavioural changes after an adverse court ruling can suggest court effectiveness. This creates a class of cases where instances of compliance will be coextensive with those of effectiveness and where effectiveness can therefore be objectively measured through the proxy of state compliance.*<sup>18</sup>

Alexandra Huneus expands upon this insight. She recognizes the risks of conflating compliance and effectiveness, but asserts that those risks are “arguably less acute” for compliance with court orders than for compliance with treaty commitments more generally. If an IC “orders compensation of the victim by a certain amount, and the state compensates by that amount, drawing a causal inference is not particularly fraught. The answer to the counterfactual—would the state have done the same without the order—seems self-evident.”<sup>19</sup>

What accounts for this sharp division in the literature? One possible explanation is different scholars are analyzing distinct phenomena. Studies that equate compliance and effectiveness focus on whether states that litigate and lose a case carry out the IC judgments against them, whereas studies that disaggregate the two concepts measure an IC’s ability to encourage compliance with underlying legal obligations.<sup>20</sup> Scholars in the first group implicitly assume that IC rulings impose meaningful

<sup>17</sup> Guzman, note 5, at 187.

<sup>18</sup> D Hawkins and W Jacoby, “Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights” (2010) 6 J. Int’l L. & Int’l Rel. 35, 40 (emphasis added). Measuring compliance is preferable, Hawkins and Jacoby argue, because accurately identifying the subset of “cases of efficacy from the wider sample of compliance” puts “enormous data demands on researchers,” at 39.

<sup>19</sup> A Huneus, “Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights” (2011) 44 Cornell Int’l L.J. 493, 505 n.61.

<sup>20</sup> Guzman, note 5, at 188. See also Shany, note 2, at 227, 244 (labeling these concepts, respectively, as “judgment-compliance” and “primary norm compliance”).

constraints on state sovereignty and freedom of action—and thus can be effective even if compliance is slow, partial, or incomplete.<sup>21</sup> Scholars in the second group suspect that many IC rulings mirror preexisting state behavior—and thus lead to high levels of compliance but low levels of effectiveness.<sup>22</sup>

As abstract propositions, both views are equally plausible—and equally non-falsifiable. Future studies should expose the assumptions underlying the two approaches and test them empirically. The claim that IC judgments mirror the outcomes that states would have obtained through negotiation or politics may be a reasonable assumption in some issue areas or contexts, but not in others.<sup>23</sup> An example of the first category are cases in which two nations submit a dispute over a territorial or maritime boundary to the International Court of Justice (ICJ) or International Tribunal for the Law of the Sea (ITLOS) on an ad hoc basis. The tribunals' jurisprudence in such cases tends toward compromise and acknowledges the merits of both parties' claims.<sup>24</sup> An illustration of the second category are human rights complaints filed by private litigants. Such suits often target domestic laws and practices that reflect deeply held national values. IC judgments challenging those values are sometimes met with skepticism or overt resistance.<sup>25</sup>

More careful attention to counterfactuals will also narrow the gap between the two approaches and assist in making plausible causal inferences about case-specific effectiveness. Recall Hawkins and Jacoby's assertion, quoted above, that when a state changes its behavior following a judgment against that state, it is reasonable to assume that the judgment materially influenced the behavioral change "even if other factors may also have been important."<sup>26</sup> Identifying the causal contribution of those "other factors" is critical to evaluating the case-specific effectiveness of ICs.

Consider the March 2011 provisional measures issued by the African Court on Human and Peoples' Rights (ACtHPR) during the civil war in Libya. The court ordered the state, then headed by Muammar Gaddafi, to "immediately refrain from any action that would result in loss of life or violation of physical integrity of persons."<sup>27</sup>

<sup>21</sup> Hawkins and Jacoby, note 18, at 83–5.

<sup>22</sup> Guzman, note 5, at 187.

<sup>23</sup> LR Helfer and A-M Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo" (2005) 93 Calif. L. Rev. 899, 941 (explaining that, in bilateral interstate disputes, ICs "may operate as an extension of nonlegal, diplomatic methods of... compliance inducement").

<sup>24</sup> See e.g., S Ratner, "Land Feuds and their Solutions: Finding International Law Beyond the Tribunal Chamber" (2006) 100 AJIL 808, 815–16.

<sup>25</sup> See e.g., LR Helfer, "The Benefits and Burdens of Brighton" (2012) ESIL Reflections, Vol. 1, Issue 1 <<http://esil-sedi.eu/node/138>> accessed December 30, 2012 (describing backlash to ECtHR judgments by government officials and voters in the United Kingdom); LR Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes" (2002) 102 Colum. L. Rev. 1832 (analyzing strident opposition of Caribbean governments to human rights litigation aimed at curtailing or abolishing capital punishment).

<sup>26</sup> Hawkins and Jacoby, note 18, at 40.

<sup>27</sup> African Court of Human and Peoples' Rights, "Order for Provisional Measures" (March 30, 2011), at para. 25.1, <<http://www.african-court.org/en/index.php/judgments/orders>> accessed December 30, 2012.

The violence markedly diminished a few weeks later, but only after the UN Security Council authorized NATO to use military force to protect civilians. An acontextual analysis of state behavior in this instance might erroneously attribute compliance to the court's ruling, rather than to the humanitarian intervention by NATO.

Other, less obvious examples cast doubt on the presumption that compliance in the wake of an adverse ruling is indicative of effectiveness. Newly elected democratic governments sometimes implement IC judgments against their predecessors as a signal to foreign and domestic audiences of their commitment to abjuring the repressive policies of the past.<sup>28</sup> In established democracies, IC litigation may be only one component of a multifaceted civil society campaign that includes domestic mobilization, national court challenges, and transnational naming and shaming strategies.<sup>29</sup> In these and similar situations, it is plausible to attribute compliance, at least in part, to broader political or geostrategic factors rather than to an IC ruling.

A final consideration relates to time horizons.<sup>30</sup> All other things being equal, a court whose decisions are implemented quickly is more effective than one whose judgments are complied with after delays. This assumption is appropriate as a preliminary baseline, but it must be adjusted to account for a range of other factors. It would be reasonable, for example, to expect compliance with broad or costly remedies to require more time than compliance with more modest judicial orders.<sup>31</sup> The compliance delays associated with a "high-aiming court," to paraphrase Yuval Shany, should be discounted when evaluating that court's case-specific effectiveness. Conversely, even immediate adherence should be given little or no weight in assessing case-specific effectiveness if, as in the Libya example above, circumstances indicate that the court's decision had little to do with the change in state behavior.

### 3 *ERGA OMNES* EFFECTIVENESS

The numerous studies of case-specific effectiveness reflect a basic feature of international adjudication: IC judgments are legally binding only *inter partes* and do not bind other states or the court in future cases.<sup>32</sup> Nevertheless, many IC rulings

<sup>28</sup> See e.g., D Cassel, "Does International Human Rights Law Make a Difference?" (2001) 2 Chi. J. Int'l L. 121, 128–34 (describing Peru's implementation of IACtHR judgments following the ousting of President Alberto Fujimori).

<sup>29</sup> See e.g., SL Cummings, "The Internationalization of Public Interest Law" (2008) 57 Duke L.J. 891, 994–5 (discussing the coordinated campaign to abolish the juvenile death penalty in the United States, which included international litigation as one of several complementary strategies).

<sup>30</sup> Shany, note 2, at 134.

<sup>31</sup> Huneeus, note 19, at 509–10.

<sup>32</sup> See e.g., ICJ Statute [1945] Art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case").



have—or at least purport to have—*erga omnes* effects that extend to all treaty parties.<sup>33</sup> This section first compares the *inter partes* rule to the *erga omnes* effect. It then reviews the literature that examines whether IC decisions are effective in influencing the behavior of actors beyond the litigants to a particular dispute.

The limited binding effect of IC rulings is an artifact of sovereignty. By recognizing an IC's compulsory jurisdiction, a state undertakes a legal obligation to comply with judgments against it. The state does not, however, consent to be bound by rulings in which it did not participate, nor does it waive the right to argue that a new case should be distinguished from similar suits involving other nations.<sup>34</sup> This limitation on international judicial authority sometimes results in repetitive litigation in which the only material difference is the identity of the countries involved in the proceedings. The trilogy of ICJ cases against the United States for violating the consular rights of foreign criminal defendants is one prominent example.<sup>35</sup>

If the *inter partes* rule were rigidly followed, international adjudication would be highly inefficient. In practice, however, ICs view their prior decisions as persuasive, especially when they have coalesced into a *jurisprudence constant*. The weight given to precedent means that “absent cogent reasons, an adjudicative body will resolve the same legal question in the same way in a subsequent case.”<sup>36</sup> Some ICs have been bolder, characterizing their decisions as authoritative for all actors in a legal system. For example, the European Court of Human Rights (ECtHR) has asserted that it “determin[es] issues on public-policy grounds in the common interest, thereby... extending human rights jurisprudence throughout the community of Convention States,”<sup>37</sup> and the World Trade Organization Appellate Body stated that “the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system.”<sup>38</sup>

An IC's assertion that its decisions have an *erga omnes* effect may, however, engender resistance by some countries. The United States, for example, has argued that the “concept of *erga omnes* is squarely at odds with the fundamentally bilateral nature of WTO and GATT dispute settlement.”<sup>39</sup> Further, many European countries

<sup>33</sup> The Latin phrase *erga omnes* means “flowing to all.”

<sup>34</sup> These statements have even greater force for ICs whose jurisdiction states recognize on an ad hoc basis.

<sup>35</sup> See e.g., R Graebne, “Dialogue and Divergence: The Vienna Convention on Consular Relations in German, American, and International Courts” (2011) 42 Geo. J. Int'l L. 605, 607–11.

<sup>36</sup> *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico* [2008] WT/DS344/AB/R [160] (Anti-Dumping Measures).

<sup>37</sup> *Karner v. Austria* [2003] App. No. 40016/98, 2003-IX Eur. Ct. H.R. [26].

<sup>38</sup> Anti-Dumping Measures, note 36, at para. 160.

<sup>39</sup> US Statement at the DSB Meeting of May 7, 2003, Item 2, US—Tax Treatment for Foreign Sales Corporations, WT/DSB/M/149 (July 8, 2003), para. 20.



do not consider the *erga omnes* effect of ECtHR rulings to be a legal requirement.<sup>40</sup> Yet there are also counter-examples. Canada abandoned its “zeroing” policy on dumping with explicit reference to prior WTO rulings against the EU and United States.<sup>41</sup> High courts in Argentina and Colombia struck down amnesty laws based on judgments of the Inter-American Court of Human Rights (IACtHR) invalidating amnesties in Peru.<sup>42</sup> And a 2010 Council of Europe report identifies countries whose parliaments have revised statutes following ECtHR judgments condemning similar laws adopted by other states.<sup>43</sup>

The politically contested and empirically unsettled nature of the *erga omnes* effect is reflected in the wide range of studies that consider whether ICs are effective in influencing the behavior of all actors subject to their authority.<sup>44</sup> One strand of scholarship has an overtly normative bent. Works in this vein seek to clarify the divergent meanings of *erga omnes* in judicial decisions and legal discourse, assess the desirability of strong or weak versions of the effect and suggest proposals to enhance the systemic impact of IC rulings. Two recent noteworthy examples are Samantha Besson’s study of the ECtHR and Karin Oellers-Frahm’s analysis of ICJ advisory opinions.<sup>45</sup>

A related literature considers whether states should redesign ICs to bolster the *erga omnes* effect. Attention has focused primarily on the ECtHR, due to its massive backlog of pending applications. The court’s docket crisis has generated political declarations, such as the 2010 Interlaken Action Plan, which urges governments to consider “the conclusions to be drawn from a judgment finding a violation of the [European] Convention by another State, where the same problem of principle exists within their own legal system.”<sup>46</sup> The crisis has also engendered arguments from scholars and judges that the ECtHR should focus on novel legal issues and articulate general principles applicable to all states parties.<sup>47</sup> Studies advocating

<sup>40</sup> S Besson, “The Erga Omnes Effect of Judgments of the European Court of Human Rights—What’s in a Name?” in S Besson (ed.) *The European Court of Human Rights After Protocol 14* (Geneva: Schulthess 2011) at 125, 141.

<sup>41</sup> J Kanargelidis, “New Anti-Dumping Rules Applied by Canada: The Zeroing Debate” (September 7, 2005) Mondaq Business Briefing.

<sup>42</sup> C Binder, “The Prohibition of Amnesties by the Inter-American Court of Human Rights” (2011) 12 German L.J. 1203, 1222–3.

<sup>43</sup> Committee on Legal Affairs and Human Rights, “Strengthening Subsidiarity—Integrating the Court’s Case-Law into National Law and Judicial Practice” (Oct. 1–2, 2010), <[http://assembly.coe.int/CommitteeDocs/2010/20101125\\_skopje.pdf](http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf)> accessed December 31, 2012.

<sup>44</sup> The issue is closely linked to whether ICs are effective in promoting what Shany refers to as “primary norm compliance” by states. Shany, note 2, at 245.

<sup>45</sup> Besson, note 40; K Oellers-Frahm, “Lawmaking Through Advisory Opinions?” (2011) 12 German L.J. 1033.

<sup>46</sup> “High Level Conference on the Future of the ECtHR,” Interlaken Declaration, February 19, 2010, Action Plan, sec. 4.c.

<sup>47</sup> See e.g., S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press 2006); L Wildhaber, “A Constitutional Future for the European Court of Human Rights” (2002) 23 Hum. Rts. L.J. 161.

a more permissive approach to third-party interventions and *amicus* briefs often reflect similar concerns.<sup>48</sup> The more that IC decisions depart from the *inter partes* rule, the greater the need for all potentially affected actors to have a meaningful opportunity to influence those decisions.

A third cluster of research uses quantitative empirical methods to analyze the behavior of governments, both as policymakers and as prospective litigants. A recent paper by Helfer and Erik Voeten considers the first issue. It finds that ECtHR judgments on LGBT rights increase the likelihood that other countries in Europe—in particular states in which public acceptance of homosexuality is low—will adopt pro-LGBT policies. To measure the *erga omnes* effect, the authors code national LGBT policies by country and year adopted, control for confounding variables that could explain policy reforms and isolate the extent to which ECtHR judges respond to preexisting legal and social trends.<sup>49</sup> Quantitative analyses of dispute settlement patterns in the WTO analyze the behavior of states as litigants.<sup>50</sup> These studies, including articles by Guzman and Beth Simmons, as well as by Marc Busch and Eric Reinhardt, do not address the *erga omnes* effect directly. They do, however, implicitly assume that prior panel and Appellate Body decisions cast a shadow that influences whether other nations litigate or settle a dispute over alleged violations of free trade rules.

Future research on *erga omnes* effectiveness should focus on identifying the specific conditions under which IC decisions are more or less likely to influence the behavior of non-parties. For example, qualitative process tracing and case studies can document variations in behavior among different branches of government in countries subject to an IC's jurisdiction. Quantitative studies can compare the strength of the *erga omnes* effect across tribunals and issue areas. Both types of studies face similar challenges: determining whether behavioral changes are attributable to IC rulings as opposed to other factors, and identifying the specific mechanisms of IC influence. As discussed in the previous section, developing credible counterfactuals and considering plausible alternative explanations for rule-consistent conduct will be critical to overcoming these challenges.

<sup>48</sup> See e.g., A von Bogdandy, "In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification" (2012) 23 EJIL 7, 27–30.

<sup>49</sup> LR Helfer and E Voeten, "International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe" (forthcoming 2014) 67 Int'l Org.

<sup>50</sup> See e.g., A Guzman and B Simmons, "To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the WTO" (2002) 31 J. Leg. Stud. 205; M Busch and E Reinhardt, "Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes" (2000) 24 Fordham Int'l L. J. 158. See also M Gilligan et al., "Strengthening International Courts and the Early Settlement of Disputes" (2010) 54 J. Conflict Res. 5.

## 4 EMBEDDEDNESS EFFECTIVENESS

A third dimension of effectiveness considers whether ICs enhance the ability of domestic actors to prevent or remedy violations of international rules “at home,” thus avoiding the need for international litigation. This section reviews studies that evaluate whether ICs are effective in embedding international law and international judicial rulings in national legal orders.

Embeddedness effectiveness received little attention when the primary task of ICs was to settle interstate disputes. The issue became far more salient when ICs were given authority to review challenges to domestic laws and policies in response to complaints filed by private actors. Yet ICs have neither the competence nor the resources to review all such challenges. This raises the critical question of whether national judges, legislators, and administrators can be incentivized to serve as the first-line defenders of international law, adopting measures that promote rule compliance and provide remedies for any violations that do occur.

Studies of whether ICs are effective in inducing domestic actors to carry out these functions focus on institutional design features, most notably jurisdiction and access rules. For example, tribunals that require complainants to exhaust domestic remedies must inevitably assess whether national judicial and administrative procedures offer viable opportunities for litigants to obtain redress for colorable violations of international law. Scholarship on regional human rights courts—such as Helfer’s study of the ECtHR,<sup>51</sup> and analyses of the IACtHR by James Cavallaro and Stephanie Brewer, and by Huneeus<sup>52</sup>—identify how these courts construct their interpretative methods and remedial orders to incentivize compliance by national decision-makers. Prominent among these strategies is giving greater deference to decision-makers who treat IC decisions as persuasive when reviewing complaints alleging violations of individual rights.

Different embeddedness issues emerge when international judges can forge direct links to their national counterparts. Scholars have widely attributed the success of the European Court of Justice (ECJ) in promoting regional integration to the court’s preliminary reference procedure, which enables domestic judges to seek guidance on the meaning of European Union law.<sup>53</sup> Spurred by requests from private litigants who benefited from favorable European rules, national courts became the ECJ’s

<sup>51</sup> LR Helfer, “Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime” (2008) 19 EJIL 125, 144–6, 152–5.

<sup>52</sup> J Cavallaro and SE Brewer, “Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court” (2008) 102 AJIL 768, 816–22; Huneeus, note 19, at 526–9.

<sup>53</sup> See e.g., GF Mancini, “The Making of a Constitution for Europe” (1989) 26 Common Mkt. L. Rev. 595.

primary interlocutors and compliance partners. Over time, judges referred a growing number of cases and became habituated to following the ECJ's rulings.<sup>54</sup> When EC rules and the supranational cases interpreting them had been firmly entrenched in national judicial mindsets, the ECJ announced the doctrine of *acte clair*, which directed national judges to refrain from referring cases that raised settled legal issues, including cases in which courts were expected to—and did—invalidate the offending domestic law or policy.<sup>55</sup>

Preliminary reference mechanisms also enable ICs to forge alliances with domestic actors other than courts. Alter and Helfer's work on the Andean legal system demonstrates that more than 90 percent of Andean Tribunal of Justice (ATJ) rulings emanate from administrative agencies that apply Andean intellectual property rules when reviewing applications to register trademarks and patents. A litigant dissatisfied with an agency's decision can appeal to national courts, which refer questions of Andean law to the ATJ and then apply the tribunal's legal interpretation to resolve the case. In practice, however, national judges have been mostly passive intermediaries in a mutually constitutive relationship between Andean judges and domestic administrators. The agencies encouraged references and participated in litigation before the tribunal, and the ATJ issued decisions that responded to the agencies' concerns. ATJ rulings improved the agencies' decision-making procedures, clarified ambiguities in Andean rules, helped to insulate officials from political pressure and bolstered administrators' fidelity to the rule of law. The agencies, in turn, acted as compliance constituencies for Andean judges, scrupulously following Andean law as interpreted by the ATJ even in the face of conflicting national decrees.<sup>56</sup>

Other studies have analyzed embeddedness issues in international criminal law. The founders of the International Criminal Court (ICC) recognized that domestic trials of genocide, war crimes, and crimes against humanity would sometimes be preferable to international prosecutions. They thus directed the ICC to declare inadmissible, *inter alia*, cases being investigated or prosecuted domestically, "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."<sup>57</sup> This complementarity principle requires the ICC to make fine-grained evaluations of the intent and capacity of government officials<sup>58</sup>—assessments that are facilitated by domestic trust

<sup>54</sup> K. Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press 2009) chs 4, 5.

<sup>55</sup> See e.g., H. Rasmussen, "The European Court's *Acte Clair* Strategy in C.I.L.F.I.T. or *Acte Clair*, of Course! But what does it Mean?" (1984) 9 *Eur. L. Rev.* 242.

<sup>56</sup> LR Helfer and K. Alter, "The Andean Tribunal of Justice and its Interlocutors: Understanding the Preliminary Ruling Reference Patterns in the Andean Community" (2009) 42 *N.Y.U. J. Int'l & Pol.* 871, 912–20; LR Helfer, K. Alter, and MF Guerzovich, "Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community" (2009) 103 *AJIL* 1, 21–6.

<sup>57</sup> Rome Statute of the International Criminal Court 1998, 2187 *U.N.T.S.* 90, Art. 17.1.

<sup>58</sup> Rome Statute of the International Criminal Court 1998, note 57, Arts 17.2 and 17.3. See also L. Yang, "On the Principle of Complementarity in the Rome Statute of the International Criminal Court" (2005) 4 *Chinese J. Int'l L.* 121.

in international proceedings. Unfortunately, the ICC's emphasis on atrocities in Africa has stirred controversy and precipitated a public rebuke by African leaders. Behind the scenes, however, scholars have highlighted how the ICC's Office of the Prosecutor is building relationships with national decision-makers and encouraging them to develop trial and accountability mechanisms that satisfy the complementary standard.<sup>59</sup> These efforts will determine the extent to which the ICC is effective in anchoring its vision of international criminal justice in national legal orders.

Future research on embeddedness effectiveness should address several understudied issues. First, a few ICs with human rights jurisdiction, including the Court of Justice of the ECOWAS Court of Justice (ECOWAS CJ) and the East African Court of Justice (EACJ), do not require exhaustion of local remedies. African NGOs have praised the omission of exhaustion as enabling litigants to bypass overburdened and unresponsive domestic courts and file complaints directly with these ICs. But direct international review of complaints can create frictions with national judges, making it harder to forge the judicial partnerships on which effective embeddedness often depends.<sup>60</sup> A second issue concerns ICs that must occasionally act as first-instance courts. The ECtHR, for example, has assumed this function when reviewing "hot spots" of civil unrest in Turkey and Chechnya.<sup>61</sup> A key challenge, however, is how a tribunal steps back from this front-line position when domestic conditions improve. A third underexplored topic concerns courts that exercise jurisdiction over countries in which governments are unstable, the rule of law is weak, or judges are only partially independent. An IC's ability to embed its rulings in such countries may require cultivating the support of sub-state institutions that "forge a relationship with a supranational tribunal as an ally in a domestic political battle against corruption or oppression."<sup>62</sup>

## 5 EFFECTIVENESS IN DEVELOPING INTERNATIONAL LAW

The previous three types of effectiveness evaluate the extent to which IC rulings alter the behavior of litigants, states, and government actors. A fourth dimension of effectiveness analyzes the norm-generating functions of ICs. The literature on this

<sup>59</sup> See e.g., W Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice" (2008) 49 Harv. Int'l L.J. 53.

<sup>60</sup> AO Enabulele, "Sailing against the Tide: Exhaustion of Domestic Remedies and the ECOWAS Community Court of Justice" (2012) 56 J. Afr. L. 268.

<sup>61</sup> Helfer, note 51, at 142–4.

<sup>62</sup> Helfer and Slaughter, note 10, at 335.

topic is vast and includes studies of treaty interpretation,<sup>63</sup> judicial lawmaking,<sup>64</sup> judicial activism,<sup>65</sup> transjudicial communication,<sup>66</sup> and the fragmentation of international law.<sup>67</sup> This section reviews a subset of this literature—studies of how the disaggregated nature of the international legal system and the quality of a tribunal's reasoning influence whether ICs are effective in developing international law.

Most ICs are specialized bodies that interpret and apply only the treaty that establishes them, or a family of closely related treaties within a single legal regime.<sup>68</sup> The ECtHR, for example, can review complaints alleging violations of the European Convention on Human Rights and its Protocols—not other human rights agreements. An IC's norm-development effectiveness is thus most often assessed by reference to how its judges interpret and apply the particular treaty or area of international law that falls within its purview.

Within these specialized domains, courts often develop a reputation for particular doctrinal innovations. The IACtHR, for example, is a pioneer in fashioning creative and far-reaching remedies for human rights abuses.<sup>69</sup> The ECtHR is famous for using the margin of appreciation doctrine to temper global human rights standards to local particularities.<sup>70</sup> The WTO jurists are well known for consulting dictionaries to deduce the ordinary meaning of trade treaties.<sup>71</sup> The ATJ has made its mark by balancing intellectual property rights against consumer protection and public health goals.<sup>72</sup> Even the ICJ—a court of general jurisdiction—has developed a niche market in territorial and maritime boundary disputes.<sup>73</sup>

<sup>63</sup> See e.g. I Venzke, "The Role of International Courts as Interpreters and Developers of the Law: Working Out the Jurisgenerative Practice of Interpretation" (2011) 34 *Loy. L.A. Int'l & Comp. L. Rev.* 99.

<sup>64</sup> See e.g., T Ginsburg, "Bounded Discretion in International Judicial Lawmaking" (2005) 43 *Va. J. Int'l L.* 631; R Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints" (2004) 98 *AJIL* 247.

<sup>65</sup> See e.g., F Zarbiyev, "Judicial Activism in International Law—A Conceptual Framework for Analysis" (2012) 3 *J. Int'l Disp. Settlement* 247.

<sup>66</sup> See e.g., A-M Slaughter, "A Typology of Transjudicial Communication" (1994) 29 *U. Rich. L. Rev.* 99; M Waters, "Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law" (2005) 93 *Geo. L.J.* 487.

<sup>67</sup> See e.g., OK Fauchald and A Nollkaemper (eds), *The Practice of International and National Courts and the (De)Fragmentation of International Law* (Oxford: Hart 2012).

<sup>68</sup> The ICJ is an obvious exception, although the court's ability to interpret international law in general is constrained by the limited number of nations that have accepted its compulsory jurisdiction, the broad reservations that often accompany such acceptances, and the paucity of disputes referred to the court on an ad hoc basis.

<sup>69</sup> See e.g., T Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond" (2008) 46 *Colum. J. Transnat'l L.* 351.

<sup>70</sup> See e.g., Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia 2002).

<sup>71</sup> C Lo, "Good Faith Use of Dictionary in the Search of Ordinary Meaning under the WTO Dispute Settlement Understanding" (2010) 1 *J. Int'l Disp. Settlement* 431.

<sup>72</sup> Helfer, Alter and Guertzovich, note 56, at 21–36.

<sup>73</sup> See e.g., A Alvarez-Jimenez, "Boundary Agreements in the International Court of Justice's Case Law, 2000–2010" (2012) 23 *EJIL* 495.



The more closely that an IC is associated with regime-specific innovations, the greater the likelihood that observers will evaluate its norm-development effectiveness by reference to its performance in that specialized area, such as whether its decisions clarify ambiguities, fill lacunae, and promote the underlying objectives of the legal obligations that the court supervises.

As the number of IC rulings has increased, however, scholars have begun to focus on “the systematic fashion in which some [ICs] are developing a body of law of general relevance.”<sup>74</sup> The Appellate Body’s statement that WTO agreements are “not to be read in clinical isolation from public international law”<sup>75</sup> is often cited as evidence of this trend. The extent to which ICs are effective in elucidating broader legal principles may depend on whether their decisions are emulated elsewhere. For example, the jurisprudence of the ECtHR—the oldest and most active IC—has long inspired other human rights tribunals, a phenomenon documented in case studies of trans-judicial dialogue and more systematic analysis of citations to IC precedents.<sup>76</sup> More recently, the decisions of newer human rights courts have influenced ECtHR judges searching for doctrinal responses to systemic human rights abuses that plague some corners of Europe.<sup>77</sup>

A related issue concerns cases that straddle the border between legal domains. Such suits arise less frequently than cases within the heartland of an IC’s jurisdiction. But how judges resolve these “boundary disputes” often receives disproportionate attention in assessments of a court’s effectiveness in developing international law. Examples include the Appellate Body’s accommodation of multilateral efforts to protect the environment and public health when adjudicating free trade disputes,<sup>78</sup> and the IACtHR’s interpretation of human rights in light of international humanitarian law.<sup>79</sup> The heightened salience of these cases is a consequence of the uneven distribution of ICs across the international legal system. Because ICs do not exist in some areas of international law (such as the environment and arms control),

<sup>74</sup> Von Bogdandy and Vetzke, note 4, at 980. See also Shaffer and Ginsburg, note 8, at 18 (arguing that a “central question regarding international tribunals...is whether [and the conditions under which] they affect the production, consolidation, and application of international law”).

<sup>75</sup> United States—Standard for Reformulated and Conventional Gasoline [1996] WT/DS2/AB/R, sec. III.B.

<sup>76</sup> See e.g., Y Lupu and E Voeten, “Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights” (2012) 42 *Brit. J. Pol. Sci.* 413; A-M Slaughter, “A Global Community of Courts” (2003) 44 *Harv. Int’l L.J.* 191.

<sup>77</sup> G Neuman, “Import, Export, and Regional Consent in the Inter-American Court of Human Rights” (2008) 19 *EJIL* 101, 116–18.

<sup>78</sup> See e.g., *Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products* [1998] WT/DS58/AB/R. Scholars disagree over the extent to which WTO jurists can apply non-WTO law. Compare J Pauwelyn, “The Role of Public International Law in the WTO: How Far Can We Go?” (2001) 95 *AJIL* 535, with JP Trachtman, “The Domain of WTO Dispute Resolution” (1999) 40 *Harv. Int’l L.J.* 333.

<sup>79</sup> L Burgorgue-Larse et al., *The Inter-American Court of Human Rights: Case-Law and Commentary* (Oxford University Press 2011) 69–71.



litigants often ask courts in other regimes (human rights and trade, for example) to apply legal rules beyond their primary areas of competence.

A more fine-grained dimension of norm-development effectiveness concerns the quality of an IC's legal reasoning. Studies of supranational adjudication in Europe, for example, attribute the success of the ECJ and ECtHR to the courts' adept use of "the language of reasoned interpretation, logical deduction, systemic and temporal coherence."<sup>80</sup> These attributes created a "compliance pull"<sup>81</sup> for judicial rulings that influenced all actors within the EC and the European Convention legal systems, in particular national judges.<sup>82</sup>

Scholarly assessments of legal reasoning generally focus on several issues. The first relates to the structure of IC opinions and the extent to which they faithfully recount the litigants' arguments before the court provides its own analysis. Such an approach offers tangible proof that the judges have at least understood the parties' claims. Litigants who believe that their arguments have been heard are more likely to participate in a future case.<sup>83</sup> A second issue concerns adherence to precedent. ICs are not bound by their own prior judgments. Yet most recognize that treating previous rulings as authoritative furthers the "interests of legal certainty, foreseeability and equality before the law,"<sup>84</sup> and encourages doctrinal consistency over time.<sup>85</sup> A third metric for evaluating legal reasoning emphasizes decisions that overturn or revise existing jurisprudence. International judges acknowledge that such rulings require a heavy burden of justification.<sup>86</sup> The weighty reasons they cite often involve the application of evolutive methods of treaty interpretation to ensure that existing case law does not become outmoded.<sup>87</sup>

<sup>80</sup> JHH Weiler, "A Quiet Revolution: The European Court of Justice and its Interlocutors" (1994) 26 *Comp. Pol. Stud.* 510, 521. See also Helfer and Slaughter, note 10, at 318–23 (identifying the "quality of legal reasoning" as an attribute of effective supranational adjudication).

<sup>81</sup> TM Franck, *The Power of Legitimacy Among Nations* (Oxford University Press 1990) 24.

<sup>82</sup> See e.g., A-M Burley and W Mattli, "Europe Before the Court: A Political Theory of Legal Integration" (1993) 47 *Int'l Org.* 41; H Keller and A Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford University Press 2008); P Popelier, et al., *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts* (Antwerp: Intersentia 2011).

<sup>83</sup> See e.g., H Lauterpacht, *The Development of International Law by the International Court* (Cambridge University Press 1958) 39 ("governments as a rule reconcile themselves to the fact that their case has not been successful—provided the defeat is accompanied by the conviction that their argument was considered in all its relevant aspects").

<sup>84</sup> *Chapman v. United Kingdom*, App. No. 27238/95, 2001-I (ECHR, Grand Chamber, 2001), at para. 70.

<sup>85</sup> See e.g., B Simma, "Universality of International Law from the Perspective of a Practitioner" (2009) 20 *EJIL* 265.

<sup>86</sup> See e.g., A Mowbray, "An Examination of the European Court of Human Rights' Approach to Overruling its Previous Case Law" (2009) 9 *Hum. Rts. L. Rev.* 179.

<sup>87</sup> See e.g., J Arato, "Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences" (2010) 9 *L. & Prac. Int'l Cts. & Trib.* 443; K Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights" (2011) 12 *German L.J.* 1730.

Future scholarship on IC effectiveness in developing international law will likely proceed along a number of tracks. As the number of international judicial rulings continues to increase, legal scholars and practicing lawyers will continue to analyze the jurisprudence of individual ICs. These court-specific studies provide indispensable guides to case law that is becoming too voluminous for non-specialists to digest without assistance. The studies also expose the doctrinal innovations of lesser-known sub-regional or specialized ICs to a wider audience of practitioners, scholars, and civil society advocates, who can then assess whether a particular court is effective in developing the legal norms within its purview.<sup>88</sup> The growing scrutiny of IC jurisprudence may generate feedback loops as judges review and potentially reassess the persuasiveness of their legal reasoning in light of these external evaluations.

The collective contributions of ICs to developing legal norms will be aided by the growing scholarly interest in the comparative dimensions of international adjudication.<sup>89</sup> The Oxford University Press book series on ICs includes several volumes that contrast the doctrines and practices of multiple tribunals. Specialized journals, such as the *Law and Practice of International Courts and Tribunals* and the *Journal of International Dispute Settlement*, have published many similar studies. Several universities have also established interdisciplinary centers devoted to ICs.<sup>90</sup> The output of these scholarly venues will provide a rich body of evidence to evaluate the ways in which ICs, both individually and collectively, are effective in developing international law.

## 6 CONCLUSION

This chapter has reviewed four dimensions of IC effectiveness. These dimensions are conceptually distinct. For example, an IC judgment may be ignored by the respondent state but trigger policy reforms in other nations subject to the tribunal's jurisdiction.

<sup>88</sup> Solomon Ebobrah's pioneering work on three sub-regional community courts in Africa is a noteworthy example. See e.g., S Ebobrah, "Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges" (2009) 17 Afr. J. Int'l & Comp. L. 79.

<sup>89</sup> See e.g., C Brown, *A Common Law of International Adjudication* (Oxford University Press 2007); J Martinez, "Towards an International Judicial System" (2003) 56 Stan. L. Rev. 429.

<sup>90</sup> See e.g., "iCourts: The Danish National Research Foundation's Centre of Excellence for International Courts" <<http://jura.ku.dk/icourts/>> accessed December 31, 2012; "ERC Project on Effective International Adjudication" <<http://www.effective-intl-adjudication.org/>> accessed December 31, 2012; UiO Faculty of Law, "MultiRights: The Legitimacy of Multi-Level Human Rights Judiciary" <<http://www.jus.uio.no/english/research/projects/multirights/>> accessed December 31, 2012; "PluriCourts: The Legitimate Roles of the Judiciary in the Global Order" <<http://www.follesdal.net/pluricourts/>> accessed December 31, 2012.

Such a ruling would have low case-specific effectiveness but high *erga omnes* effectiveness. There is, however, a degree of overlap between the four dimensions at the margins, such as where an IC persuades national judges to remedy international law violations “at home” (increasing embeddedness effectiveness) and also influences the jurisprudence of other ICs (enhancing norm-development effectiveness). Careful attention to the multiple functions that international judges perform will help determine whether a court is effective in one or more of the four categories.

Future research might also consider the relationships among different types of effectiveness. ICs vary in their ability to influence state behavior, anchor their judgments in domestic law, and develop international norms. Scholars might investigate the causes of these variations and their consequences for issues such as the legitimacy of international institutions. A related line of inquiry would consider when different efficacy objectives are mutually reinforcing or in tension with each other. For example, an IC that is effectively embedded in national legal orders might generate fewer international complaints and, as a result, have fewer opportunities to articulate *erga omnes* norms applicable to all states. Similarly, a court that encourages litigants to settle their disputes may receive high marks for case-specific effectiveness but be less effective in developing international law.

## RESEARCH QUESTIONS

1. Under what conditions can a change in a state's behavior following an international court judgment against that state be attributed to the judgment as opposed to other factors?
2. Under what circumstances do international court decisions influence the behavior of actors other than the parties to a particular dispute?
3. What strategies do international judges use to incentivize compliance by national decision-makers, thereby avoiding the need for international litigation?
4. How does the disaggregated nature of the international legal system affect whether international courts are effective in developing international legal norms?

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